

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

BEFORE THE  
DEPARTMENT OF BUSINESS OVERSIGHT  
STATE OF CALIFORNIA

THE COMMISSIONER OF BUSINESS  
OVERSIGHT,

Complainant,

v.

KEVIN VIRGIL LAGORIO,

Respondent.

Case No. 137472

OAH No. 2018060543

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Department of Business Oversight as its Decision in the above-entitled matter, with technical or other minor changes on the attached Errata Sheet, pursuant to Government Code section 11517(c)(2)(C).

This Decision shall become effective on July 8, 2019.

IT IS SO ORDERED THIS 6<sup>th</sup> day of June, 2019.



  
MANUEL P. ALVAREZ  
Commissioner of Business Oversight

BEFORE THE  
DEPARTMENT OF BUSINESS OVERSIGHT  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

THE COMMISSIONER OF BUSINESS  
OVERSIGHT,

Complainant,

v.

KEVIN VIRGIL LAGORIO,

Respondent.

Case No. 137472

OAH No. 2018060543

**PROPOSED DECISION**

Administrative Law Judge Dena Coggins, Office of Administrative Hearings, State of California, heard this matter on October 29, and October 30, 2018, in Sacramento, California.

William Horsey, Senior Counsel, represented complainant Jan Lynn Owen, Commissioner of the Department of Business Oversight (Department).

Gurjeet Rai, Attorney at Law, represented respondent Kevin Virgil Lagorio, who was present at the hearing.

The record was left open to allow the parties an opportunity to submit closing briefs and replies. The parties submitted closing briefs, marked as Exhibit 150, Department's closing brief; and Exhibit A, respondent's closing brief. Respondent submitted a timely reply brief marked as Exhibit B. The reply brief was filed by the Department. The record was closed and the matter was submitted for decision on January 25, 2019.

## FACTUAL FINDINGS

### *Introduction*

1. The Department is the agency responsible for enforcement of the California Corporate Securities Law, Corporations Code section 25000 et seq., and the regulations promulgated thereunder at Code of Regulations, title 10, section 260.000 et seq.

2. Respondent was issued an investment adviser certificate by the Commissioner in 1997. Respondent is organized as a sole proprietorship under California laws. According to respondent's 2017 Form U4 Uniform Application for Securities Industry Registration or Transfer, he reported that he was the Chief Executive Officer of Universal Energy Group, Inc. (UEG) from August 2004 to present. He further reported that he was the President of UEG, "a dealer and distributor of solar products."

3. On April 6, 2018, complainant Jan Lynn Owen, Commissioner of Business Oversight, issued a notice of intention to issue orders: 1) revoking the investment adviser certificate of respondent, pursuant to Corporations Code section 25232; and, 2) barring respondent from any position of employment, management or control of any investment adviser, broker-dealer or commodity adviser pursuant to Corporations Code section 25232.1. On the same day, complainant filed an Accusation in support of the notice of intention to issue the orders.

4. Complainant seeks to revoke the investment adviser certificate of respondent and to bar respondent from any position of employment, management or control of any investment adviser, broker-dealer or commodity adviser based upon allegations respondent violated Corporations Code section 25232, including: a) recommending unsuitable investments for clients (Cal. Code Regs., tit. 10, § 260.238, subd. (a)); b) borrowing money or securities from a client who was not a broker-dealer, an affiliate of the adviser or a financial institution engaged in the business of loaning funds (Cal. Code Regs., tit. 10, § 260.238, subd. (f)); (c) making false statements to the Commissioner during the course of an examination and investigation, with the intent to impede, obstruct or influence the administration or enforcement of any provision of this action (Corp. Code, § 25404); and d) failing to maintain books and records (Corp. Code, § 25241, and Cal. Code Regs., tit. 10, § 260.241.3).

### *Department Examiners' Testimony*

5. Michael Nelson testified at the hearing. He is the supervising corporation examiner for the Broker-Dealer Investment Advisor Program at the Department. He has a bachelor's degree in business administration with a focus on accounting. His duties include conducting examinations of broker dealers and investment advisers.

6. Mr. Nelson received a referral from the Department's enforcement department to conduct a non-routine examination of respondent with Department examiner Eric

Chandra. They performed a regulatory examination of the business conducted under respondent's Investment Adviser certificate pursuant to Corporations Code section 25241.<sup>1</sup> As part of the examination, Mr. Nelson interviewed respondent on May 8, 2017. Mr. Chandra also testified at the hearing. He is a corporation examiner at the Department and performs complex examinations.

7. On or about July 31, 2017, Mr. Nelson sent respondent the results of the examination relating to potential statutory and regulatory violations and requested additional information from respondent. Respondent subsequently provided some of the requested information.

#### *Unsuitable Investments for Advisory Clients*

8. During the Department's examination of respondent, Mr. Nelson discovered that respondent put his investment advisory clients' funds into triple leveraged exchange-traded funds (ETF's). Many of those clients were elderly. For the review period of January 1, 2017, to April 30, 2017, eleven clients held the following ETF's: ProShare UltraPro QQQ; ProShares Ultra Pro Financial Select Sector; Daily S&P Biotech Bull 3x Share; and Direxion Daily MSCI Real Estate Bear 3x Share. The ProShares Ultra Pro Financial Select Sector, for example, is a fund that invests in derivatives, which are financial instruments whose value is derived from the value of an underlying assets, such as stocks, bonds or funds (including ETF's), interest rates, or indexes. The fund invests in derivatives as a substitute for investing directly in stocks in order to gain leveraged exposure to the S&P Financial Select Sector Index. The fund seeks daily investment results, before fees and expenses, that correspond to three times the daily performance of the S&P Financial Select Sector Index.

9. The Direxion Prospectus relating to the ETF's at issue stated:

The Direxion Daily MSCI Real Estate Bear 3x Shares . . . seeks daily *inverse* leveraged investment results and is very different from most other exchange-traded funds. As a result, the Fund may be riskier than alternatives that do not use leverage because the Fund's objective is to magnify the daily performance of the MSCI US REIT Index (SM subscript) . . . .

The Fund is not suitable for all investors. The Fund is designed to be utilized only by knowledgeable investors who understand

---

<sup>1</sup> Corporations Code section 25241, subsection (c) provides:

All records referred to in this section are subject at any time and from time to time to reasonable periodic, special, or other examinations by the commissioner, within or without this state, as the commissioner deems necessary or appropriate in the public interest or for the protection of investors.

the potential consequences of seeking daily leveraged investment results, understand the risks associated with the use of leverage and shorting and are willing to monitor their portfolios frequently. The Fund is not intended to be used by, and is not appropriate for, investors who do not intend to actively monitor and manage their portfolios. An investment in the Fund is not a complete investment program.

[T]he Fund does not seek to achieve its stated investment objective for a period of time different than a trading day.

10. The ProShares Ultra Pro Financial Select Sector Prospectus contains similar cautionary language. For example, the prospectus stated:

ProShares UltraPro Financial Select Sector (the “Fund”) seeks investment results for a single day only, not for longer periods.

The Fund is different from most exchange-traded funds in that it seeks leveraged returns relative to the Index and only on a daily basis. The Fund also is riskier than similarly benchmarked exchange-traded funds that do not use leverage. Accordingly, the Fund may not be suitable for all investors and should be used only by knowledgeable investors who understand the potential consequences of seeking daily leveraged investment results. Shareholders should actively manage and monitor their investments, as frequently as daily.

The Fund does not seek to achieve its stated investment objective over a period of time greater than a single day.

(Emphasis omitted.)

11. In an August 18, 2017 letter containing a response to the Department’s request for information, respondent stated, “[I] have made my clients an incredible return, managed the volatility, and now I will back off the volatility which has already started and will continue and that is our job.” During the examination, respondent did not provide the Department supporting documentation to justify the long term placement of his investment clients in these risky investments.

*Borrowing Money or Securities from a Client*

M.C.

12. M.C. was one of respondent’s investment advisory clients. Also, respondent provided her with accountant services and they were personal friends. At the time of

hearing, she was 79 years old and residing in a memory care facility. M.C. did not testify at the hearing.

13. In March 2010, respondent issued M.C. a promissory note that states:

FOR VALUE RECEIVED, the undersigned, each as principal, jointly and severally, promise(s) to pay to the order of [M.C.] . . . the sum of Fourteen Thousand Five Hundred Dollars with interest thereon from March 18, 2010 at of [sic] 9.000 percent per annum until payment hereof, as listed on the attached amortization schedule updated annually.

(Emphasis in original.)

14. The loan to respondent was for the purchase of two vehicles. In respondent's August 18, 2017 letter responding to the Department's request for information, respondent acknowledged receiving the loan from M.C., stating, "I only borrowed once, and paid the note back, I did not know this was a prohibited transaction and I paid above market interest rates at 9 percent. The promissory note that was secured by my vehicles was paid in full, I will never do anything with investment clients, except investment work."

15. During the Department investigation, the Department obtained information from respondent that contained M.C.'s TD Ameritrade personal log-in information. Respondent asserted that he had the information in connection with his work as M.C.'s accountant.

A.F.

16. A.F. is the daughter of M.C. A.F. testified at the hearing. Respondent was A.F.'s accountant and personal friend; A.F. later became respondent's investment advisory client. She learned about UEG in 2007. She understood that respondent was making solar-powered hot water heaters, which respondent represented to her were patented; however, at the hearing, A.F. was not clear about whether the representation was made before or after her investment in UEG. In July 2007, respondent issued A.F., and her husband M.F., a promissory note for \$15,000 convertible to preferred stock of UEG. The promissory note states:

FOR VALUE RECEIVED, the undersigned, each as principal, jointly and severally, promise(s) to pay to the order of [M.F.] and [A.F.] . . . the sum of Fifteen Thousand Dollars with interest thereon from July 1, 2007 at of [sic] 6.000 percent per annum. This note will be paid in full if the principal and interest sum is converted to Preferred Stock.

(Emphasis in original.)

17. After her investment, A.F. received numerous letters from respondent that led her to believe that patents were being filed in connection with UEG products. In 2010, A.F. received a certificate for one share of stock for UEG; however, the certificate does not specify whether the share is preferred or common stock. A.F. never received an interest payment or any return on her investment in UEG.

18. In 2011, A.F. discovered that M.C. had ten credit cards issued to her with account addresses for respondent's place of business. No criminal charges were filed against respondent relating to M.C.'s ten credit cards that listed the cardholder's address as respondent's business address.

M.F.

19. M.F., A.F.'s husband, was also respondent's investment advisory client. At the time of his investment in UEG, respondent represented to M.F. that he was developing patents for a new technology involving a solar powered water heating system. M.F. and A.F. withdrew from their retirement accounts to fund their UEG investment.

20. M.F. received numerous letters from respondent on UEG letterhead detailing the company's successes after his investment. In a January 8, 2015 letter, respondent wrote:

We do not have to worry since we are protected by filing two patents on these systems. One of the patents indirectly covers the commercial system since the only difference is that we are adding an off the shelf heat pump to the installation. We named our solar electric water heating system the "DC Hydro Hot System" and the website we are setting up will bear that name as well.

21. M.F. recalled having other investment accounts with respondent and closing those accounts in about 2010. In 2007, M.F.'s net worth was approximately \$70,000.

J.S.

22. J.S., one of respondent's investment advisory clients, testified at the hearing. J.S. is 71 years old and retired. Respondent also provided tax preparation services to J.S. for 20 years. In 2007, respondent discussed UEG with J.S., and J.S. later invested \$10,000 into UEG, receiving a Demand Promissory Notes dated September 7, 2007. The promissory note stated, "the sum of Ten Thousand Dollars with interest thereon from September 07, 2007 payable monthly at the rate of 6.000 percent per annum. This note will be paid in full if the principal and interest sum is converted to Preferred Stock." At the time of the investment, J.S.'s net worth was close to \$10,000. J.S. never received a return on his investment in UEG. J.S. and his wife received one share each of UEG stock. The stock certificate does not specify whether the one share is preferred or common stock.

### *Failure to Maintain Books and Records*

23. During the Department's onsite examination, the Department requested financial books and records for the period ending April 30, 2017. Respondent provided only partial financial books and records that were not comprehensive. The Department also requested respondent's general ledger for the period ending April 30, 2017, but the general ledger was not provided to the Department, as respondent did not maintain a general ledger. The Department's examination revealed respondent failed to maintain a record of the Minimum Financial Requirements Worksheet for the month ending June 30, 2017, clients' brokerage account applications, clients' Investment Management Agreements, client trust documents, and client brokerage account statements.

### *Making False Statements to the Commissioner*

24. During the Department's May 8, 2017 interview with respondent, respondent denied that the firm or any personnel had been involved in any regulatory investigation, action, or litigation in the last five years. Likewise, respondent denied the firm or any personnel had been the subject of any civil complaint, arbitration, or criminal proceeding in the last five years. The following day, by written correspondence, respondent made a similar representation that neither his firm nor his employees had been involved in any complaints, arbitrations, civil or criminal litigation or any regulatory events since registration (inception) as a Sole Proprietorship Registered Investment Advisor.

25. Respondent failed to disclose that in December 2014, the Department subpoenaed investment advisory records from respondent during the examination interview. In a July 2017 letter to respondent regarding the regulatory examination, the Commissioner asked respondent to provide a written explanation why he failed to disclose to Department examiners that the firm was previously involved in a regulatory event or Department investigation. In an August 18, 2017 letter containing a response to the Department's request for information, respondent acknowledged, "I have had subpoenas over the years" and asserted that he believed the examiners were asking him to report if he had been cited or convicted only.

26. Also during the examination, respondent told Mr. Chandra that he had patents relating to UEG products. Mr. Chandra requested that respondent provide the patents, which he failed to do.

### *Respondent's Misrepresentations to Investors*

27. Respondent sent letters to investors, including M.F., A.F., and J.S., wherein he made misrepresentations relating to UEG. For example, in a letter to UEG investors on August 11, 2011, respondent represented that a company, Discount Solar, committed to buying \$50,000 in wholesale purchases from UEG. However, Mr. Nelson found no evidence during the examination to show that Discount Solar made such a commitment or made any purchases from UEG. In a letter to UEG investors, dated November 5, 2012, respondent

represented that UEG was working on “[p]otential projects with various restaurant chains: BJ’s, Food Maker (Jack-in-the Box), In & Out Burger and Buffalo Wild Wings . . . .” However, during the Department’s investigation, tax returns for UEG for tax periods between 2006 and 2015, did not confirm respondent’s representation. Also, in the same letter, respondent represented that UEG had partnered with Seize the Sun Energy and Discount Solar to “work on various projects,” but respondent provided no evidence during the investigation of those partnerships. Likewise, in a letter to UEG investors dated January 8, 2015, he represented the following:

We are working on three other products right now and believe me, this takes a lot of time dealing with the engineers, suppliers, etc. We do not have to worry since we are protected by filing two patents on these systems. One of the patents indirectly covers the commercial system since the only difference is that we are adding an off the shelf heat pump to the installation.

28. However, respondent provided no evidence to the Department during its examination to show UEG filed the two patents discussed in the letter despite the Department’s request that respondent provide copies of the patents. Also, in letters sent to his investment advisory clients, respondent maintained that he developed proprietary products for UEG; however, he was only a distributor of solar products as confirmed in his filed 2017 Form ADV documents.

*Agreement to Provide Services*

29. Respondent entered into an agreement with Thomas Kennedy, for a fee, to provide consulting services to respondent consisting of advice related to financial instruments. Respondent did not provide any evidence to the Department that Mr. Kennedy was registered and disclosed on the Financial Industry Regulatory Authority, Inc.’s Investment Adviser Registration Depository or that the business relationship was disclosed to respondent’s investment clients, including on a Form U4 Uniform Application for Securities Industry Registration or Transfer or Form ADV Uniform Application for Investment Adviser Registration and Report by Exempt Reporting Advisers. The evidence at hearing, however, did not clearly indicate when the relationship agreement to provide services between respondent and Mr. Kennedy existed and what, if any, services Mr. Kennedy actually provided.

*Promissory Notes*

30. During the Department’s investigation, the Department obtained several Demand Promissory Notes for respondent’s investment clients, including those discussed above. The Promissory Notes stated the following, in part:

FOR VALUE RECEIVED, the undersigned, each as principal, jointly and severally, promise(s) to pay to the order of . . . the

sum of . . . with interest thereon from . . . payable monthly at the rate of 6.000 percent per annum. This note will be paid in full if the principal and interest sum is converted to [UEG] Preferred Stock.

No due date was listed when the promissory notes were to be paid. During the examination, respondent provided no evidence that the shareholders received preferred stock or that they received a return of money. Moreover, the promissory notes were not exempt or qualified securities that would allow them to be offered or sold to investors.

#### *Respondent's Refusal to Testify*

31. At the hearing, the Department asserted that any testimony given by respondent would be used in a criminal investigation against respondent. Respondent did not testify at the hearing. He invoked his Fifth Amendment right against self-incrimination and refused to answer any questions posed by the Department.

32. However, at the start of the hearing, respondent stipulated that he violated Corporations Code section 25110 by issuing promissory notes for investments in UEG, which constituted the sale of unqualified securities. Also, respondent stipulated that he violated California securities law by receiving a loan from M.C. for the purchase of vehicles in the amount of \$14,500.

#### *Discussion*

33. The ETF's respondent placed his investment clients into during the investment period were risky and unsuitable. They were suitable only for day traders willing to take a loss. Respondent's clients placed in ETF's included elderly clients, and between 50 to 99 percent of their portfolios were held in ETF's during a majority of the review period, January 1, 2017, through April 30, 2017 — well over the time period recommended in the prospectus for their stated investment objective. Investing any investor assets, much less over 90 percent of the assets of some investors, in these speculative and extremely high risk ETF's was unsuitable for respondent's clients. His doing so constituted a breach of an investment adviser's fiduciary duty to his clients.

34. The evidence further established respondent borrowed \$14,500 from an investment client, failed to maintain required client records, sold securities that were not qualified or exempt, and engaged in a practice that operated as a deceit upon his clients. Accordingly, the Department established that respondent violated numerous provisions of the Corporations Securities Law of 1968, and his license should be subject to revocation. Such discipline is in the public interest and necessary for public protection.

///

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. The burden of proof in this matter is on complainant to establish the charging allegations by clear and convincing evidence. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 857.) The key element of clear and convincing evidence is that it must establish a high probability of the existence of the disputed fact, greater than proof by a preponderance of the evidence. (*People v. Mabini* (2001) 92 Cal.App.4th 654, 662.)

### *Causes to Revoke Investment Adviser Certificate of Respondent and to Bar Respondent*

2. Corporations Code section 25232 provides, in pertinent part, that the commissioner may revoke the certificate of an investment adviser if the commissioner finds that revocation is in the public interest and that the investment adviser, or any employee of the investment adviser,

(e) Has willfully violated any provision of . . . Title 4 (commencing with Section 25000) . . . or of any rule or regulation under any of those statutes, or any order of the commissioner which is or has been necessary for the protection of any investor.

3. Corporations Code section 25232.1, provides that the commissioner may bar from any position of employment, management or control of any investment adviser, broker-dealer or commodity adviser, any officer, director, partner, employee of, or person performing similar functions for, an investment adviser, or any other person, if the commissioner finds that the bar is in the public interest and that the person has “committed any act or omission enumerated in subdivision (a), (e), (f), or (g) of section 25232 or has been convicted of any offense or held liable in any civil action specified in subdivision (b) or Section 25232 or is enjoined from any act, conduct or practice specified in subdivision (c) of Section 25232 or is subject to any order specified in subdivision (d) of Section 25232.”

4. A licensed investment adviser shall not engage in investment advisory activities or attempt to engage in investment advisory activities in California in contradiction of such rules as the commissioner may prescribe designed to promote “fair, equitable and ethical principles.” (Corp. Code, § 25238.)

### UNSUITABLE INVESTMENTS

5. Corporations Code section 25238 provides that no licensed investment adviser, or person associated with an investment adviser, shall engage in investment adviser activities or attempt to engage in investment advisory activities, “in contradiction of such rules as the commissioner may prescribe designed to promote fair, equitable and ethical principles.” The

activities so prescribed are found and listed in California Code of Regulations, title 10, section 260.238. Section 260.238, subdivision (a), states, in pertinent part, that promoting fair, equitable or ethical principles does not include recommending to a client “the purchase, sale or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client’s investment objectives, financial situation and needs . . . .”

6. As set forth in Factual Findings 8 through 11, the evidence established that between January 1, 2017, to April 30, 2017, respondent caused several of his investment advisory clients to purchase and hold highly speculative ETF’s for an unreasonable amount of time. Respondent failed to provide evidence to the Department during its examination that the highly speculative ETF investments were consistent with his clients’ investment objectives and instructions. And although there was no evidence to show his clients lost invested funds as a result of being held in the ETF’s for an unreasonable period of time, the unsuitable nature of the investments is sufficient to show respondent violated Corporations Code section 25238 and California Code of Regulations, title 10, section 260.238, subdivision (a). Therefore, cause exists to revoke respondent’s investment adviser certificate and to bar respondent pursuant to Corporations Code sections 25232, subdivision (e), and 25232.1.

#### FAILURE TO MAINTAIN BOOKS AND RECORDS

7. Corporations Code section 25241 provides:

- (a) Every broker-dealer and every investment adviser licensed under Section 25230 shall make and keep accounts, correspondence, memorandums, paper, books, and other records and shall file financial and other reports as the commissioner by rule requires, subject to the limitations of Section 15(h) of the Securities Exchange Act of 1934 with respect to brokers-dealers and Section 222 of the Investment Advisers Act of 1940 with respect to investment advisers.
- (b) All records so required shall be preserved for the time specified in the rule.
- (c) All records referred to in this section are subject at any time and from time to time to reasonable periodic, special, or other examinations by the commissioner, within or without this state, as the commissioner deems necessary or appropriate in the public interest or for the protection of investors.

- (d) For the purpose of avoiding unnecessary duplications of examinations, the commissioner, insofar as he or she deems it practicable in administering this section, may cooperate with the securities administrators of other states, the Securities and Exchange Commission and any national securities exchange or national securities association.
- (e) Unless otherwise provided by rule, every investment adviser subject to Section 25230 . . . , shall furnish an authorization for disclosure to the commissioner of financial records of the licensee's broker-dealer or investment adviser business pursuant to Section 7473 of the Government Code.

8. California Code of Regulations, title 10, section 260.241.3, provides, in pertinent part, that every licensed investment adviser shall make and keep true, accurate and current books and records relating to his investment advisory business including written agreements entered into by the investment adviser with any client relating to the business, general and auxiliary ledgers reflecting asset, liability, income and expense accounts, bank and financial statements, and worksheets that contain computations of minimum financial requirements, among other items. Also, an investment adviser is required to maintain a record of the computations of minimum net worth and all powers of attorney and other evidences of the granting of any discretionary authority by any client to the investment adviser, or copies thereof. (Cal. Code Regs., tit. 10, § 260.241.3, subs. (a)(9) and (j).)

9. As set forth in Factual Finding 23, the evidence established that respondent willfully failed to maintain true, accurate and current books and ledgers, including a record of the Minimum Financial Requirements Worksheets, clients' brokerage account applications, clients' Investment Management Agreements, client trust documents, and client brokerage account statements, in violation of Corporations Code sections 25238 and 25241. Therefore, cause exists to revoke respondent's investment adviser certificate and to bar respondent pursuant to Corporations Code sections 25232, subdivision (e), and 25232.1.

#### BORROWING MONEY OR SECURITIES FROM CLIENTS

10. California Code of Regulations, title 10, section 260.238, subdivision (f), provides that borrowing money or securities from a client, unless the client is a broker-dealer, an affiliate of the adviser, or a financial institution engaged in the business of loaning funds or securities, does not promote "fair, equitable or ethical principles," as that phrase is used in section 25238 of the Business and Professions Code.

11. As set forth in Factual Findings 12 through 14, and 32, respondent stipulated that he borrowed money from a client, M.C., for the purchase of two vehicles. There was no evidence to show that M.C. was a broker-dealer, an affiliate of respondent, or a financial institution engaged in the business of loaning funds. Therefore, respondent's act of

borrowing money from client M.C. was a violation of Corporations Code section 25238. Therefore, cause exists to revoke respondent's investment adviser certificate and to bar respondent pursuant to Corporations Code sections 25232, subdivision (e), and 25232.1.

#### SELLING SECURITIES THAT WERE NOT QUALIFIED OR EXEMPT

12. Corporations Code section 25110 states the following:

It is unlawful for any person to offer or sell in this state any security in an issuer transaction (other than in a transaction subject to Section 25120), . . . , unless such sale has been qualified under Section 25111, 25112 or 25113 (and no order under Section 25140 or subdivision (a) of Section 25143 is in effect with respect to such qualification) or unless such security or transaction is exempted or not subject to qualification under Chapter 1 (commencing with Section 25100) of this part.

13. A "security" means any "note; stock; evidence of indebtedness . . ." (Corp. Code, § 25019.)

14. As set forth in Factual Findings 30 and 32, respondent stipulated to a violation of section 25110 by issuing promissory notes to his clients who invested in UEG, as that act constituted the sale of a security that was not qualified or the subject of an exemption between 2006 and 2008. Accordingly, cause exists to revoke respondent's investment adviser certificate and to bar respondent pursuant to Corporations Code sections 22232, subdivision (e), and 25232.1.

#### ENGAGING IN A PRACTICE OF BUSINESS THAT OPERATES AS DECEIT UPON CLIENTS

15. Corporations Code section 25235 provides, in part, that it is unlawful for any investment adviser, directly or indirectly:

(a) To employ any device, scheme, or artifice to defraud any client or prospective client.

(b) To engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon any client or prospective client.

16. The "question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor." (*Lynch v. Cook* (1983) 148 Cal.App.3d 1072, 1081-1082, citing *TSC Industries, Inc. v. Northway, Inc.* (1976) 426 U.S. 438, 445.) "A fact is material if there is a substantial likelihood that, under all circumstances, a reasonable investor would consider it important in reaching an investment decision." (*Insurance Underwriters Clearing House, Inc. v. Natomas*

Co. (1986) 184 Cal.App.3d 1520, 1526.) The test of materiality, as a matter of law, is when “the established omissions are so obviously important to an investor, that reasonable minds cannot differ on the question of materiality.” (*TSC Industries v. Northway*, supra, 426 U.S. at 450.)

17. As set forth in Factual Findings 17, 19, 20, and 28, the evidence established respondent willfully engaged in a practice of sending letters to clients with material misstatements about the success of UEG, which operated as a deceit upon those clients. Therefore, cause exists to revoke respondent’s investment adviser certificate and to bar respondent pursuant to Corporations Code sections 25232, subdivision (e), or 25232.1.

#### *No Causes for Disciplinary Action*

##### MISREPRESENTATIONS TO THE DEPARTMENT EXAMINER

18. Corporations Code section 25404, subdivision (b), provides that it is unlawful to make an untrue statement to the commissioner during the course of licensing, investigation, or examination, with the intent to impede, obstruct, or influence the administration or enforcement of any provision of the Corporate Securities Law.

19. As set forth in Factual Findings 24 through 26, the evidence established that respondent made misstatements to the Department examiners on May 8, 2017, including when he denied that the firm or any personnel had been involved in any regulatory investigation, action, or litigation in the last five years, and made the same denial in his written correspondence to the Department the following day. However, several days later he recalled the investigation and provided information about the investigation to the Department. Importantly, however, there was insufficient evidence to show that his misstatements were intended to impede, obstruct or influence the examination. Therefore, cause to revoke respondent’s investment adviser certificate and to bar respondent does not exist as to this issue.

##### UNTRUE STATEMENTS OF MATERIAL FACT TO OFFER OR SELL A SECURITY

20. Corporations Code section 25401 makes it unlawful for a person to offer or sell a security in California by means of any communication, written or oral, that includes an untrue statement of a material fact or omits to state a material fact necessary to make the statements made, in the light of the circumstances under which the statements were made, not misleading.

21. Complaint alleges respondent made misrepresentations and omissions of material fact, including claims of owning patents. However, the evidence did not clearly establish that those statements were made to offer or sell a UEG security. Therefore, the evidence did not establish a violation of Corporations Code section 25401 by respondent and

cause does not exist to revoke respondent's investment adviser certificate and to bar respondent pursuant to Corporations Code sections 25232, subdivision (e), or 25232.1.

#### MAINTAINING ACCESS TO CLIENT ACCOUNTS

22. California Code of Regulations, title 10, section 260.237, states the following, in part:

It is unlawful and deemed to be a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of Section 25235 of the Code for an investment adviser licensed or required to be licensed, to have custody of client funds or securities . . . .

23. As set forth in Factual Finding 15, the evidence established respondent had the personal log-in information for an investment client's TD Ameritrade account. However, there was insufficient evidence to establish respondent had "custody" of the client's funds or securities, as that term is defined by California Code of Regulations, title 10, section 260.237. Therefore, the evidence did not establish a violation of Corporations Code section 25235 by respondent and cause does not exist to revoke respondent's investment adviser certificate and to bar respondent pursuant to Corporations Code sections 25232, subdivision (e), or 25232.1, as to this issue.

#### *Conclusion*

24. The regulatory scheme designed to protect investors in California depends upon full disclosure of required information by licensees; fair and equitable investments; and, carrying out fiduciary obligations to clients. Respondent's violations of those investor protections is deeply concerning. Public protection requires, and it is in the public interest to revoke respondent's investor adviser certificate at this time and to bar respondent from any position of employment, management, or control of any investment adviser, broker-dealer or commodity adviser.

#### ORDER

1. The investment adviser certificate issued to Kevin Virgil Lagorio, is revoked.
2. Kevin Virgil Lagorio is barred from any position of employment, management, or control of any investment adviser, broker-dealer or commodity adviser.

DATED: February 22, 2019

  
\_\_\_\_\_  
DENA COGGINS  
Administrative Law Judge  
Office of Administrative Hearings